

THE BRIEF

SPRING 2018

Harned Delivers Two Important Testimonies to Congress on the Impact of Regulation on Small Business

In March, NFIB Small Business Legal Center Executive Director Karen Harned testified before two committees in the House of Representatives regarding the impact of regulation on small business.

Before the House Committee on Small Business, Ms. Harned testified on the positive impact deregulation has had on small business and ways Congress can give small business owners a greater voice in the regulatory process.

"Overzealous regulation is a continuous concern for small business," said Harned. "So it is not surprising to learn that America's small business owners view President Trump's commitment to rolling back unnecessarily burdensome and duplicative regulation as one of his Administration's greatest accomplishments in his first year in office," she told the committee.

Harned credited the Trump administration for its 36 percent reduction of the number of pages in the Federal Register.

"For the fiscal year 2017, President Trump promised to eliminate two

regulations for every new one proposed. But the Administration exceeded that goal—eliminating 22 regulations for every new regulatory action. Indeed, agencies undertook sixty-seven deregulatory actions and levied only three regulatory rules," she said.

Harned asked Congress to help create lasting regulatory reform, noting that NFIB supports the expansion of the Small Business Regulatory Enforcement Fairness Act, which was passed two decades ago. Harned stressed the need for all agencies to be required to use Small Business Advocacy Review panels for rules that will significantly impact a substantial number of small businesses.

A week later, Ms. Harned was before the House Committee on Government Reform and Oversight discussing the problem of federal agencies increasingly using "subregulatory" tools to regulate.

She testified that "much more work can and should be done to make the federal regulatory process more transparent and more accountable to the American people, particularly when it comes to regulation through guidance documents and other

"sub-regulatory" pronouncements that impose new mandates on small business." Harned also commended to committee members the NFIB Small Business Legal Center's September 2015 report, "The Fourth Branch & Underground Regulations." According to Harned, a true guidance or advisory should do no more than restate the requirements of established law -- ideally as plainly and simply as possible. It should not impose new affirmative burdens on the regulated community.

The NFIB Small Business Legal Center continues to be the "go to" expert for Congress when it comes to regulation and its impact on small business. We understand the burdens that regulations impose on your business and will continue to push for common-sense reforms to prevent agencies from promulgating unnecessarily burdensome regulations and make unelected bureaucrats more accountable to small business and all Americans.

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Fighting Illegal Regulation in the States

By Karen R. Harned,
Executive Director

As I pointed out recently, for small business one of President Trump's biggest accomplishments in his first year in office has been his administration's deregulatory efforts. The Department of Labor and Environmental Protection Agency, among others, are working to repeal of many of the Obama-era rules that would have hit small businesses hard. Moreover, federal agencies are proposing fewer new regulations each day.

These combined efforts to get the federal government off the backs of small business are long overdue and one of the drivers of a booming economy. But, as is often the case, when one part of our federalist system of government puts its foot on the regulatory brakes, another part often picks up speed. And that's what we are seeing in the states. As a result, the NFIB Small Business Legal Center is as active as it has ever been in state courts across the country.

In April, the NFIB Small Business Legal Center filed its latest lawsuit challenging an ordinance enacted by the city of Austin, TX that requires all businesses to offer paid sick leave to employees. Under the ordinance, Austin businesses would be required to give workers six to eight days of paid sick leave a year depending on the size of the business. We argue this ordinance violates the Texas Constitution.

In March we filed briefs in two important Pennsylvania cases. The NFIB Legal Center filed a brief challenging the legality of Pittsburgh's paid sick leave ordinance in *Building Owners and Managers Association of Pittsburgh v. City of Pittsburgh*. State law prohibits Pennsylvania's cities from imposing burdens on business. We argue in our brief that it is vital that the court affirmatively tell Pennsylvania cities that state law prohibits them from creating city-wide mandates on employment-related issues, which range from the minimum wage that must be paid to leave requirements. Running a small business is complicated enough without opening the door to municipalities piling-on and imposing their own set of employment standards on area businesses.

In *Williams v. City of Philadelphia*, we filed a brief challenging Philadelphia's soda tax. We argue that Pennsylvania law forbids cities from imposing taxes on distributors of retail products that are also subject to a state sales tax. The stakes are high. As we argue in our amicus brief, a decision upholding Philadelphia's soda tax regime would invite other municipalities to follow-suit in adding taxes on disfavored products.

The NFIB Small Business Legal Center is fighting an unconstitutional double taxation scheme with a brief we filed in *Kansler v. Mississippi Department of Revenue*. The NFIB Small Business Legal Center filed an amicus brief because the outcome of the case will affect small-business owners who commonly earn income on sales or services across state lines.

In the case, Michael Kansler was granted stock options in New York, but exercised those options only after moving to Mississippi. The New York Department of Revenue concluded definitively that the Kanslers owe taxes on this income in New York but they had already paid taxes on it in Mississippi. The NFIB Legal Center maintains that the couple is constitutionally entitled to a refund in Mississippi because they should not be required to pay taxes twice on the same income.

Finally, our state work recently resulted in a great win. Like many states, Minnesota has enacted unclaimed property laws under which the state assumes control of private property, like a bank account that has not been accessed in years. The Minnesota Supreme Court recently agreed with the Legal Center and found that whenever the state takes interest-bearing property, it must return that property with interest. Previously Minnesota would return the principal account upon request, but without any earned interest. With the Minnesota Supreme Court's decision in *Hall v. State*, we've established that the Constitution's Takings Clause ensures meaningful protections against unclaimed property laws.

Thanks to the support of our generous donors, the Legal Center is able to enter into many of these important legal fights in states across the country.

Sincerely,

Karen R. Harned
Executive Director

Back-to-Back Supreme Court Victories Bring Legal Certainty for Small Business in Tax and Wage and Hour Disputes

This spring, the NFIB Small Business Legal Center celebrated two big wins in the U.S. Supreme Court.

In April, in a closely watched wage and hour dispute, the Supreme Court held in *Encino Motorcars LLC v. Navarro* that the U.S. Department of Labor exceeded its authority under the Fair Labor Standards Act when it reversed a longstanding regulatory interpretation relied upon by employers for decades.

“Small business owners rely heavily on a stable and consistent regulatory environment as they grow their businesses,” said Karen Harned, Executive Director of the NFIB Small Business Legal Center. “The Supreme Court’s decision is welcome news for small businesses who cannot afford increased overtime costs mandated by the Department of Labor, or the time and resources needed to fight costly wage and hour lawsuits.”

NFIB filed an amicus brief in this case and argued that courts should reject the idea overtime exemptions should be construed narrowly against the employer and defer to agency statutory interpretations favoring employee eligibility for overtime. In a 6-2 ruling, the Supreme Court found that DOL exceeded its authority by too narrowly construing an overtime exemption.

Also, this spring, the Legal Center applauded the Supreme Court’s decision in *Marinello v. United States*. The case dealt with whether federal prosecutors went too far in charging a business owner with obstruction of justice – a felony – for failing to keep tax records that were not affirmatively required by law. The NFIB Small Business Legal Center filed an amicus brief in this case, arguing that the Supreme Court should construe obstruction of justice statutes reasonably to allow for criminal prosecution only when a company takes actions to impede a known investigation.

“Small business owners spend an excessive amount of time, paperwork, and money trying to comply with the tax code,” Harned said. “This is an important win for small business as it helps protect small business owners from being prosecuted for good faith conduct.”

At press, the NFIB Small Business Legal Center is still awaiting decisions in other cases in which it participated this term. Most closely watched is *Janus v. American Federation of State, Municipal and County Employees*, where the Court is set to decide whether it is constitutional for a state to compel public employees to pay fees to unions. A decision in *Janus* is expected in June, at the very end of the Supreme Court’s term.

Supreme Court Hears Our Call to Open Federal Courthouse Doors for Landowners

As our supporters know and appreciate, the NFIB Small Business Legal Center has made a priority of pushing back against overregulation on all fronts. This is especially true when it comes to property rights. So, when overzealous lawmakers and bureaucrats seek to take away these rights, we have fought for full and fair compensation under the Takings Clause of the Fifth Amendment.

In our efforts we’ve confronted one major obstacle for small businesses seeking just compensation for regulatory takings of property. Remarkably, under current law, landowners are told that to invoke their rights under the Takings Clause they must first litigate in state court before proceeding to federal court. But this bizarre rule makes no sense because it is impossible to go to federal court after having already lost in state court.

Nonetheless, for over thirty years the lower courts have rigidly applied the rule from *Williamson County Regional Planning Commission v. Hamilton Bank* to deny claimants the right to have their cases heard in federal court. Instead, small business landowners are forced to litigate in state courts that may be more hostile to property rights (think California, Vermont, etc.).

The NFIB Legal Center has repeatedly asked the Supreme Court to reconsider this unconstitutional rule. We were pleased to see that the Court has finally agreed to take up this issue in *Knick v. Township of Scott, Pennsylvania*. The *Knick* case presents an opportunity to correct a grave constitutional error, and for the NFIB Legal Center to score a major victory for the small business community.

In this case a landowner seeks compensation for a municipal ordinance that gives the public a right to traverse her land. We’ve seen similar enactments in other jurisdictions. For example, local and state authorities have sought to create public trails across private lands to promote public recreation. But this sort of enactment is flatly unconstitutional and problematic for small business landowners who have a keen interest in prohibiting trespassers.

The Supreme Court has slowly been restoring the property rights of all Americans. This case gives them yet one more opportunity to ensure small business owners have complete access to the courts in property disputes.

Just in Time for Summer -- DOL Adopts New Test for Unpaid Interns



Recently, the U.S. Department of Labor announced a more relaxed standard to determine whether interns and students are paid employees under the Fair Labor Standards Act. The new guidelines will make it easier for companies to mentor unpaid interns.

The seven-part test is flexible, and no single factor determines whether an intern needs to be paid minimum wage:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including clinical and other hands-on training.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

For more on wage and hour laws, visit NFIB.com/legal.

MEDIA MENTIONS

NFIB Small Business Legal Center

April 6, 2018 – Karen Harned discussed the importance of the Supreme Court's decision in *Encino Motorcars, LLC v. Navarro*.

<http://oregonbusinessreport.com/2018/04/supreme-court-reverses-obama-overtime-rule>

"The Supreme Court's decision is welcome news for small businesses who cannot afford increased overtime costs mandated by the Department of Labor, or the time and resources needed to fight costly wage and hour lawsuits."

March 15, 2018 – Coverage of executive director Karen Harned's testimony in front of the House Oversight and Government Reform Committee.

<https://insurancenewsnet.com/oarticle/house-oversight-government-reform-committee-issues-testimony-from-national-federation-of-independent-business-2>

February 25, 2018 – Karen Harned discussed the power of public employee unions, and how they can shut out the voices of small businesses.

<https://www.cnn.com/2018/02/25/politics/scotus-union-nonmember-case/index.html>

Feb 15, 2018 – Elizabeth Milito discussed "tip sharing" with Bloomberg Law.

<https://www.bna.com/gop-strands-labor-n57982088783>

"The rule is really limited in scope," Elizabeth Milito, senior executive counsel at the National Federation of Independent Business, told Bloomberg Law. "I know if you read the media stories you might just think this new rule is going to apply to all tipped employees but that is definitely not the case."

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THE NFIB SMALL BUSINESS LEGAL CENTER, a 501(c)(3), public interest law firm, protects the rights of America's small business owners by serving as the voice of small business in the courts and the legal resource for small business owners nationwide. It is not a legal defense fund for small business, but a legal tool to affect precedent-setting legal decisions that will influence small business' bottom line.